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NO. 90-4 44

IN THE SUPREME COURT OF THE
UNITED STATES

STATE OF ALABAMA

PETITIONER,

VS.

JERRY RAY CARRELL

RESPONDENT.

# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND APPENDICES

OF

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## STATEMENT OF ISSUES PRESENTED

1. Where a party is charged with a certain offense, and the charges are dismissed, but the party is subsequently indicted on the original charges, is the time between the dismissal of the original charges and the subsequent indictment properly considered for the purposes of the right to a speedy trial?

2. For speedy trial purposes, does a court err in finding prejudice solely on the basis of a forty-three month delay of trial?

3. Where an indicted party is at liberty and under no restraints of any sort, and the indictment is secret so that neither the indictee nor the public know of it and for a considerable period of time the indictee cannot be located for arrest on the capias warrant, is the time between the return of the secret indictment and the arrest of the indictee properly considered for speedy trial purposes?

## THE PARTIES

The parties in all of the lower courts were the same as those in this proceeding, the same being set out in the caption.

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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

STATE OF ALABAMA,

PETITIONER,

V.

JERRY RAY CARRELL,

RESPONDENT.

---

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

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## OPINIONS AND ORDERS BELOW

The order of the Court of Criminal Appeals of Alabama, entered June 30, 1989, affirming, without opinion, Respondent Carrell's conviction is reported as follows:

> Carrell, Jerry Ray v. State, 1 Div. 842, 550 So.2d 1086, (Ala. Crim. App, 1989)

A copy of the report of such order is submitted herewith in Appendix "A".

The order of the Court of Criminal Appeals of Alabama, entered August 25, 1989, denying without opinion, Respondent Carrell's application for rehearing and request for the finding of facts is reported as follows:

> Carrell, Jerry Ray v. State, 1 Div. 842, 553 So.2d 136 (Ala. Crim. App, 1989)

A copy of the report of such order is submitted herewith in Appendix "A".

The opinion and order of the Supreme Court of Alabama, entered May 11, 1990, reversing the judgment of the Court of Criminal Appeals of Alabama and rendering judgment in favor of Respondent Carrell and the order of June 15, 1990, denying the State's application for rehearing, are not as yet reported but will be reported as follows:

Ex parte Jerry Ray Carrell
Re: Jerry Ray Carrell v.
State, ___ So.2d ___ (Ala, 1990)

Copies of the same are submitted herewith as Appendix "B".

## JURISDICTION

The opinion and order of the Supreme Court of Alabama was issued on May 11, 1990, rehearing was denied on June 15, 1990, and this petition is filed within ninety (90) days of said date. This Honorable Court's Jurisdiction is invoked under 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Supreme Court of Alabama believed that its decision was mandated by the Sixth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Your Petitioner is making a claim under the same said provisions. Said constitutional provisions read:

"[AMENDMENT VI]

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." (Emphasis supplied)

"AMENDMENT XIV

"Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdictions thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATUTORY PROVISIONS INVOLVED

No statutory provisions are at issue in this proceeding. Respondent Carrell was convicted under Sections 13A-6-66 & 67, Code of Alabama, 1975, which are set out in Appendix "C" to this Petition.

## STATEMENT OF THE CASE

On August 2, 1984, Respondent Carrell was arrested on inferior court warrants[1] charging him with sexual abuse of three underage females contrary to Sections 13A-6-66 & 67, Code of Alabama, 1975; Appendix "C". The warrants were issued by the District Court of Mobile County on the complaint of a

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1. The Alabama Supreme Court's opinion refers to these charges as having been brought by indictment. (Appendix "B", pages 50, 54, 55, 60, 63 & 64) This is inaccurate. The brief filed in Respondent Carrell's behalf in the Alabama Supreme Court accurately states:

> "The Petitioner [Carrell] first appeared in the District Court of Mobile County on these charges in September of 1984, following his August, 1984, arrest." (Brief in Support of the Petition, page 4)

citizen[2]. When the Respondent appeared for preliminary hearing, in September, 1984, the charges were dismissed by the prosecution.[3] (R.pp. 4-5 and 97-98) It is undisputed that from the dismissal of the District Court warrants in September of 1984, until his arrest on the indictments on August 6, 1987, the Respondent was not in custody, under bond or in any way deprived of his liberty, when the secret indictments were

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2. Such complaints are commonly filed by citizens without any police or prosecutorial involvement. Such appears to be the case here. The prosecutor's statement of the facts, made without any defense objection, at the time of the guilty plea mentions citizens and the Alabama Departments of Human Resources and Mental Health, but does not refer to any police or prosecutorial official or agency. (R.pp. 63-66)

3. The record does not show why the charges were dismissed, but such dismissals of charges based on citizens' complaints are not remarkable.

returned, he had no knowledge of them until his arrest. (Tr.p. 5)

On November 18, 1985, the Respondent was separately indicted for two instances of sexual abuse in the first degree and one instance of sexual abuse in the second degree involving three female children. (R.pp. 1-6) Under Alabama law, indictments are secret until the indictee is arrested. Section 15-8-70, Code of Alabama, 1975, Appendix "C". Capias warrants were issued on the indictments. (R.pp. 6, front and back)

On August 6, 1987, the Respondent was arrested on the capias warrants. (R.p. 6)

On August 17, 1987, the Respondent waived arraignment and pleaded not guilty. (R.pp. 10-12)

On September 16, 1987, the Respondent moved to dismiss the indictments, claiming that the delay from the time of his original arrest until the date of the motion had denied him a speedy trial. (R.pp. 41-42)

On January 8, 1988, the motion to dismiss was heard before Honorable Michael Zoghby, a Circuit Judge; the motion was denied on February 11, 1988. (R.pp. 43-44)

On April 7, 1988, the Respondent pleaded guilty to all three indictments. His pleas were accepted and he was found and adjudged guilty and sentenced to ten (10) years imprisonment for each conviction for sexual abuse in the first degree and one (1) year for the conviction of sexual abuse in the second degree. All sentences were suspended and the Respondent was placed

on probation for five (5) years. (R.pp. 47-49 and Tr.pp. 49-72)

Subsequently, pursuant to a motion for a new trial, the above proceedings were re-affirmed, but the Respondent's right to appeal was clarified. (R.pp. 50-61 and 73ff)

The Respondent appealed his convictions, and on June 30, 1989, the Court of Criminal Appeals Alabama affirmed the Respondent's convictions without opinion. Carrell v. State, 1 Div. 842, 550 So.2d 1086 (Ala. Crim. App, 1989); Appendix "A". On August 25, 1989, the Respondent's application for rehearing and request for the finding of facts were denied. Carrell v. State, 1 Div. 842, 553 So.2d 136 (Ala. Crim. App, 1987); Appendix "A".

On certiorari, the Alabama Supreme Court reversed and rendered

the Respondent's convictions on May 11, 1990, on finding that the Respondent had been denied a speedy trial. In reaching this conclusion, the Alabama Supreme Court held that the Respondent's right to a speedy trial attached at the time of his November 18, 1985, indictment, so that the twenty-one months during which the Respondent could not be located, during which the indictments were secret and the Respondent was under no sort of restraint, were added to eight months between his arrest and guilty plea for speedy trial purposes. Although the Court rejected the Respondent's claim that his speedy trial rights attached at the time of his original arrest in 1984, the Court referred with concern to that arrest and the time between the dismissal of those charges and the indictment some seven times in its

opinion. The Alabama Supreme Court gave little credit to the Respondent's claim of actual prejudice based on his alleged faded memory, but found prejudice on the basis of the delay from the time of the dismissal of the original charges in 1984. The Court wrote:

> "(4) Prejudice to the defendant. The defendant contends that he was prejudiced by the delay because, he says, his memory has faded. Although ordinarily a mere assertion of a loss of memory is not enough of a showing of prejudice to support a finding that a defendant has been denied due process, where the delay is excessive and is the result of unexcused inaction by the State, the delay is prima facie prejudicial. Murray v. Wainwright, 450 F.2d 465 (5th Cir.1971); United States ex rel. Solomon v. Mancusi, 412 F.2d 88 (2d Cir.), cert. denied, 396 U.S. 936 (1969). We find that the delay in this case was of such length that defendant's right to a speedy trial has been violated. While the record does not show why the initial charges were dismissed, it would appear that the defendant, at the time of the dismissal, had a right to assume that he would not be

> charged again, and unexcused inaction in a case involving alleged sexual misconduct involving children could be especially prejudicial to a defendant, because the prosecution must depend on the testimony of the alleged victims in many cases...." (Mns. op. p. 11; Appendix "B", pp. 67-68; emphasis supplied.)

Justice Janie L. Shores dissented from the Court's decision. (Ex parte Carrell, ___ So.2d ___ (Ala, May 11, 1990; Appendix "B")

On June 15, 1990, the Alabama Supreme Court denied the State's application for rehearing. (Ibid.)

## STATEMENT OF THE FACTS

### I.

### IN GENERAL

The Respondent was initially arrested on August 2, 1984, but those charges were dismissed about a month later in September of 1984. From then

until his arrest on the indictments on August 6, 1987, he remained at liberty and under no restraint of any sort. The Respondent was indicted on November 18, 1985, but he knew nothing of this indictment until his arrest under it on August 6, 1987. (Tr.p. 5)

The Respondent moved to dismiss the indictments on speedy trial grounds on September 16, 1987, about one month after his arrest. The same was denied, and the Respondent pleaded guilty on April 17, 1988, slightly over eight months after his arrest.

## II.

## EFFORTS TO LOCATE THE RESPONDENT

The Petitioner is, of course, bound by the Alabama Supreme Court's finding that the Sheriff's Office was negligent in its efforts to locate the

Respondent (Mns. op. p. 10; Appendix "B", pp. 65-66), but the Supreme Court also expressly rejected any suggestion "...that the State deliberately delayed his [Respondent's] trial in order to gain a prosecutorial advantage...." (Mns. op. p. 9; Appendix "B", p. 63)

From the record it is clear that, while the officers did not do every thing possible to locate the Respondent, they did actively seek him, processing his capias according to the Department's usual procedures, except for a special task force on outstanding warrants in late 1986. (Tr.pp. 29, and 11-42)

## II.

## PREJUDICE TO THE RESPONDENT

The only claim of actual prejudice made by the Respondent was his alleged dimmed memory. He testified:

"...Q. [By Defense Counsel] Now, Mr. Carrell, in the three years that transpired between your original arrest in August of '84 and your next arrest in August of '87, you have kept up with your cases?

"A. I haven't heard anything on the cases at all.

"Q. Do you remember everything that happened as far as the cases, as far as the little girls, as far as your statements, if any, to the officers, do you remember all of that now?

"A. No sir.

"Q. Did you remember it back in August of '87 when they came and got you again? Did you remember all about the case?

"A. No sir.

"Q. You remembered you had been arrested --

"A. Yes --

"Q. But you didn't remember all of it. Is that a fair a statement?

"A. Yes sir...." (Tr.pp. 6-7)

On cross-examination, he testified:

"...Q. [By the Prosecutor] Do you remember essentially what you were confronted with and accused with doing to these young ladies?

"A. Yes sir.

"Q. Okay, and do you remember also talking to Department of Human Resources workers regarding these cases after the accusations were made and before charges were brought?

"A. I talked to several people.

"A. Okay, and do you remember talking with the Human Resource Worker and the parents of the children after the accusations were made but before the charges were brought?

"A. Not really.

"Q. And do you remember certain statements you made to them regarding this matter and your position in it?

"A. No.

"Q. Oh, you are saying you have forgotten all of this? Is that what you're saying?

"A. Yes sir.

"Q. Okay, so in essence what you're telling the Court is that

you have just forgotten all about the accusations made --

"THE WITNESS: No, I have not.

"MR. HAAS: [Defense Counsel] Judge, he didn't say that.

"THE WITNESS: I did not say that.

"Q. You remember very well what your part in this was, don't you? You remember very well, don't you?

"A. Yes sir...." (Tr.pp. 9-10)

And, of course, the Respondent ultimately pleaded guilty.[4] (R.pp. 47-49 and Tr.pp. 49-72)

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4. "...A guilty plea is an admission of all the elements of the offense charged.... [Citations omitted]

"The United States Supreme Court in Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969), held that a guilty plea 'is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.'...." (Russell v. State, 428 So.2d 131, 134 [Ala, 1982])

## SUMMARY OF THE ARGUMENT

I. (A) In finding prejudice on the basis of the time from the dismissal of the original charges, the Alabama Supreme Court ruled contrary to this Honorable court's clear teaching in United States v. McDonald (456 U.S. 1, 71 L.Ed.2d 696, 102 S.Ct. 1497 [1982]).

I. (B) In finding prejudice solely on the basis of the delay of trial and, in effect, holding that a certain period of delay was per se prejudicial, the Alabama Supreme Court ruled contrary to this Honorable Court's rulings in Barker v. Wingo (407 U.S. 514, 33 L.Ed.2d 101, 92 S.Ct. 2182 [1972]) and Moore v. Arizona (414 U.S. 25, 38 L.Ed.2d 183, 94 S.Ct. 188 [1973]).

II. (A) It is well recognized that an arrest triggers the right to a speedy trial. Dillingham v. United

States, 423 U.S. 64, 46 L.Ed.2d 205, 96 S.Ct. 303 (1975). This Honorable Court has never addressed the question of whether an unarrested indictee has any speedy trial rights for the period prior to his arrest on the indictment. United States v. Marion (404 U.S. 307, 30 L.Ed.2d 468, 92 S.Ct. 455 [1971]), United States v. Lovasco (431 U.S. 783, 52 L.Ed.2d 752, 97 S.Ct. 2044 [1977]), and United States v. McDonald (456 U.S. 1, 71 L.Ed.2d 696, 102 S.Ct. 1497 [1982]), which are often cited for the proposition that speedy trial rights attach on indictment, without more, did not in fact involve this issue. However, the concerns of speedy trial as identified in cases like those and Barker v. Wingo (407 U.S. 514, 532, 33 L.Ed.2d 101, 118, 92 S.Ct. 2182 [1972]) have no application to unarrested indictees.

II. (B) There is a sharp conflict among the jurisdictions over the speedy trial rights of unarrested indictees. However, in the only cases reflecting any sort of analysis, United States v. Hay (527 F.2d 990, 994 [10th Cir, 1975]; cert den. 425 U.S. 935, 48 L.Ed.2d 176, 96 S.Ct. 1666) and United States v. Watson (599 F.2d 1149, 1156, fn, 5 [2nd Cir, 1979]), the courts declined to give speedy trial credit to unarrested indictees.

II. (C) The unarrested indictee is a common problem in every jurisdiction in this Country. The instant case presents an excellent vehicle for addressing the question of speedy trial in the context of the unarrested indictee, because, the speedy trial issue is the only issue in this case, the speedy trial issue rises and

falls on the starting point of the speedy trial clock, and this case presents no unusual incidences.

## ARGUMENT

The decision of the Alabama Supreme Court is in clear constitutional error on two points, in that it conflicts with the controlling decisions of this Honorable Court. In addition, the Court decided an important issue on which this Honorable Court has never passed. The purpose of this petition is to draw this Honorable Court's attention to this novel question, but we would be remiss if we did not at least mention the two other points. Therefore, we briefly address these matters immediately below.

REASONS FOR GRANTING THE WRIT:

I.

CONFLICTS WITH THE DECISIONS AND OPINIONS OF THE SUPREME COURT OF THE UNITED STATES.

A.

CONFLICT WITH UNITED STATES V. MCDONALD (456 U.S. 1 [1982])

It cannot be disputed that the Alabama Supreme Court expressly stated the principle that the Respondent's right to a speedy trial attached at the time of his November 18, 1985, indictment and formally counted the length of the delay[5] as being the twenty-nine months from that date until his guilty plea on April 7, 1988. However, it also cannot be ignored

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5 "...[W]e identify four such factors [as measuring a possible denial of speedy trial]: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant...." (Barker v. Wingo, 407 U.S. 514, 530, 33 L.Ed.2d 101, 117, 92 S.Ct. 2182 [1972]; emphasis supplied)

that the Alabama Supreme Court expressed concern, relative to the speedy trial issue, for the period preceding the indictment.[6] Most importantly, in addressing the issue of prejudice, the Alabama Supreme Court gave little credit to the Respondent's only claim of actual prejudice and found prejudice solely on the basis of the length of the delay, from the time of the dismissal of the original charges[7], a period of some forty-three months.

The Alabama Supreme Court's action on this point cannot be

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[6]For example: "...It is apparent that defendant's conviction occurred more than four years after he was initially indicted on the charges...." (Mns. Op. p. 5; Appendix "B", p. 55; emphasis supplied.)

[7]See the language quoted from the opinion in our Statement of the Case, pp. 12-13, above.

reconciled with this Honorable Court's opinion in United States v. McDonald (456 U.S. 1, 71 L.Ed.2d 696, 102 S.Ct. 1497 [1982]), wherein this Honorable Court expressly held that where charges against a person are dropped and the person is subsequently indicted on the original charges, the time prior to the indictment is not cognizable for speedy trial purposes. For this reason, the writ should issue.

B.

CONFLICT WITH BARKER V. WINGO (407 U.S. 514 [1972])

In Barker v. Wingo (407 U.S. 514, 33 L.Ed.2d 101, 92 S.Ct. 2182 [1972]), this Honorable Court ruled that claims of denials of speedy trial were to be measured against four basic factors: The "...length of delay, the reason for the delay, the defendant's assertion of

his right and prejudice to the defendant. (407 U.S. 514, 530, 33 L.Ed.2d 101, 117). In Moore v. Arizona (414 U.S. 25, 38 L.Ed.2d 183, 94 S.Ct. 188 [1973]) this Honorable Court reaffirmed the four factors and rejected the notion that one is of controlling significance. In the instant case, the Alabama Supreme Court found prejudice solely, as a practical matter, on the basis of the length of the delay.

This Honorable Court has identified the prejudice against which the right to a speedy trial is directed as follows:

> "...(i) to prevent oppressive pre-trial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired...." (Barker, above, 407 U.S. 514, 532, 33 L.Ed.2d 101, 118)

To these must be added:

> "...The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes...."
> (Klopfer v. North Carolina, 386 U.S. 213, 222, 18 L.Ed.2d 1, 7, 87 S.Ct. 988 [1967])

In the instant case, the Respondent claimed no trial prejudice, except with regard to an alleged impairment of his defense by his alleged dimmed memory. But, he contradicted himself on this point on cross-examination and by his guilty plea and his claim on this point was rejected by the Trial Court and the Court of Appeals and given little, if any, weight by the Alabama Supreme Court.[8] As to the other factors, they

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[8]It is most difficult to imagine a person's being interviewed by a state welfare agency concerning his allegedly molesting three little girls and being arrested for such acts and then forgetting everything about the incident in a lifetime, let alone four years.

have no possible application except to a period of about nine months at most, about a month from the Respondent's original arrest until the charges were dismissed and eight months from his arrest under the indictment until his guilty plea disposed of the charges. For the remaining period, no matter how it is calculated, the Respondent was not in any way restrained, he could not have been anxious or concerned about an indictment of which he knew nothing, and he could not be subjected to public scorn, because the indictment was withheld from the public.

The Alabama Supreme Court's finding of prejudice was based almost entirely, if not entirely, on the length of delay, which it calculated from the date of the dismissal of the original charges. The Court's decision is in

effect a holding that a forty-four month delay is per se so prejudicial as to outweigh all other considerations. This flies directly in the face of what this Honorable Court wrote in Barker, above, and Moore, above. The Alabama Supreme Court's ruling on this point is in particular conflict with Barker, wherein this Honorable Court found "...that prejudice was minimal...." (407 U.S. 514, 534, 33 L.Ed.2d 101, 119), even though the delay of trial was "...well over five years...." (Ibid.)

Due to this manifest conflict with this Honorable Court's teachings, the writ should issue in this case.

II.

A.

A NOVEL QUESTION

It is, of course, well established that an arrest initiates a prosecution and triggers the arrestee's

right to a speedy trial.[9] Dillingham v. United States, 423 U.S. 64, 46 L.Ed.2d 205, 96 S.Ct. 303 (1975). In United States v. Marion (404 U.S. 307, 30 L.Ed.2d 468, 92 S.Ct. 455 [1971]) and United States v. Lovasco (431 U.S. 783, 52 L.Ed.2d 752, 97 S.Ct. 2044 [1977]), this Honorable Court held that pre-indictment delay did not come under speedy trial. In United States v. MacDonald (456 U.S. 1, 71 L.Ed.2d 696, 102 S.Ct. 1497 [1982]), this Honorable Court reached the same conclusion with regard to an indictee who had been arrested prior to indictment but had been released when the charges were

---

[9]"Arrest", of course, includes detainers lodged against persons already imprisoned on other charges. Smith v. Hooey, 393 U.S. 374, 21 L.Ed.2d 607, 89 S.Ct. 575 (1969). See Estrada v. State, 611 P.2d 850, 852-853 (Wyo, 1980) and Bauhaus v. State, 532 P.2d 434, 439 (Okl. Cr, 1975).

dismissed. These cases, Dillingham, Marion, Lavasco and McDonald, are commonly cited for the proposition that the right to a speedy trial is triggered by an arrest or an indictment, whichever comes first. This was the principle applied by the Alabama Supreme Court in this case, in applying speedy trial principles to the twenty-one month period when the Respondent was under secret indictment but could not be located or arrested.

However, Marion, Lavasco and McDonald did not address the question of post-indictment, pre-arrest delay. Those cases were concerned with pre-indictment delay only, the time between indictment and arrest being in each of these cases negligible. Indeed, the rationale of these cases was that, except for possible trial prejudice,

which is a general due process concern, a person who is not in custody, not under bond and is not yet indicted, suffers none of the burdens to which speedy trial is addressed.

Due process is concerned with actual prejudice to an accused in presenting his defense, but speedy trial goes beyond that consideration and addresses also the adverse effects of being accused, e.g. loss of liberty, anxiety over being charged, and public scorn. Barker v. Wingo, 407 U.S. 514, 532, 33 L.Ed.2d 101, 118, 92 S.Ct. 2182 (1972). Where a person is not in custody or under bond and is at large, as free as any citizen, should his situation be judged by standards designed to protect arrested persons from prolonged loss of liberty? How could a person suffer anxiety over

a secret indictment, about which he knows nothing? Where an indictment is withheld from public knowledge, how could it occasion public scorn?

We respectfully submit that, although this Honorable Court has never addressed the question of whether the time during which an indictee cannot be located or arrested is subject to a speedy trial analysis, this Honorable Court's opinions clearly demonstrate that the answer should be in the negative.

B.

CONFLICTS AMONG THE JURISDICTIONS

It must be conceded at the outset that apparently most of state courts which have actually addressed this issue have concluded, like the Alabama Supreme Court, that indictment triggers speedy

trial rights, even if the indictment is secret and the indictee is unaware of the indictment and under no restraints. People v. Valasques, 641 P.2d 943, 951 (Colo, 1982); Commonwealth v. Conant, 12 Mass. App. 287, 423 N.E.2d 1035, 1036 (1981); State v. Brouillette, 286 N.W.2d 702, 706 (Minn, 1979); People v. Nichols, 60 Ill. App. 3rd 919, 18 Ill. Dec. 330, 377 N.Ed.2d 815, 819 (1978), cert. den; Yarbor v. State, 546 P.2d 564 (Alaska, 1970); Daniels v. State, 30 Md. App. 432, 352 A.2d 859, 862 (1976); cert. den. However, the courts invariably cite the principle without analysis and actually find denials of speedy trial on the basis of such delay only rarely. For example, among the cases cited above, only in People v. Nichols was a denial of speedy trial actually found. These state courts

often evidence a certain reluctance to apply the principle they espouse. There is an apparent hesitancy to apply principles designed to protect people from prolonged unreasonable restraint, anxiety and public scorn, to individuals who suffered none of these evils. For example, in Stewart v. State (354 N.E.2d 749, 752-753 [Ind. App, 1978]), the Court refused to decide whether to treat post-indictment, pre-arrest delay as speedy trial time or not. But, see Kristek v. State, 535 N.E.2d 144, 145 ff (Ind. App, 1989). California, on the other hand, starts the speedy trial clock with the filing of the complaint in misdemeanor cases. (Serna v. Superior Court, 40 Cal. 3rd 239, 219 Calif. Rptr. 420, 707 P.2d 793 [1985] cert. den. 475 U.S. 1096, 89 L.Ed.2d 894, 106 S.Ct. 1493) but not in felony

cases. People v. Hannon, 19 Cal. 3rd 588, 138 Calif. Rptr. 885, 564 P.2d 1203, 1213 ff (1977).

Like their state counterparts, most of the U.S. Courts of Appeal recite the principle, "...[t]he right to a speedy trial is not triggered by the date of the alleged crime but by the suspect's arrest or indictment, whichever comes first. United States v. Milhim, 702 F.2d 522, 525 (5th Cir, 1983). See also United States v. Martin, 543 F.2d 577, 579 (6th Cir, 1976); cert. den. 429 U.S. 1050, 50 L.Ed.2d 766, 97 S.Ct. 762; United States v. Cordova, 537 F.2d 1073, 1076 (9th Cir, 1976); cert. den. 429 U.S. 960, 50 L.Ed.2d 327, 97 S.Ct. 385; United States v. Gonzalez, 671 F.2d 441, 444 (11th Cir, 1982); cert. den. 456 U.S. 994, 73 L.Ed.2d 1291, 102 S.Ct. 2279; United

States v. Jones, 524 F.2d 834, fn. 7, 839 (D.C. App, 1975). However, as with the state courts, findings of denial of speedy trial on the basis of post-indictment, pre-arrest delay are rare, and none of the above cases produced that result.

In only two cases, so far as the undersigned can discover, has the problem of the speedy trial effect of a secret indictment, on which no arrest has been made, been addressed at any length. In both of those cases United States Courts of Appeal ruled that the right to a speedy trial did not commence until the indictees were arrested. In United States v. Hay (527 F.2d 990 [10th Cir, 1975]; cert. den. 425 U.S. 935, 48 L.Ed.2d 176, 96 S.Ct. 1666), the Court wrote:

> "...We do not include the time from appellant's indictment to his arrest because appellant was not available for prosecution and because none of the interests protected by the sixth amendment guarantee were endangered during this time.[4]....
>
> "4. In this case the indictment was ordered sealed. Appellant was subject to neither restraints on his liberty nor public accusation before his arrest. See United States v. Marion, 404 U.S. 307, 92 S.Ct. 445, 30 L.Ed.2d 468 (1971)...." (527 F.2d 990, 994)

The same conclusion was reached on the basis of a similar analysis in United States v. Watson, (599 F.2d 1149, 1156, fn. 5, [2nd Cir, 1979]). It should be noted that while Hay and Watson are the only courts to reach this conclusion, which is, of course, the Petitioner's position in this case, they are also the only courts to give this issue any analysis at all.

There is an obvious conflict among the jurisdictions on this fundamental issue of constitutional law. It is a conflict where the quantity of the authority appears to be on one side and the quality on the other. It is a conflict which this Honorable Court ought to resolve.

C.

SPECIAL REASONS WHY THE WRIT SHOULD ISSUE IN THIS CASE.

The problem of the unexecuted criminal process is an old one in this Country, due to our mobility and size. In every jurisdiction in this Nation there are numerous outstanding warrants. In some cases, the subjects of these warrants are fugitives actively avoiding discovery and arrest; in others the subjects simply cannot be located, and in most of these cases it is

difficult to know into which category a given subject falls. This case presents the issue of whether these persons have the right to a speedy trial as to the delay occasioned by unsuccessful efforts to locate them and arrest them. As we have shown above, this Honorable Court has never examined this issue and there is conflict among the jurisdictions which have. The instant case presents a particularly useful vehicle for such an examination by this Honorable court, for several reasons.

First, the speedy trial issue is the only issue in this case. While that issue is well presented by the short record in this case, there are no other questions of fact or law to confuse the speedy trial issue.

Second, the speedy trial issue in this case rises or falls on the starting

point issue. Obviously, the pre-indictment delay must be excluded. United States v. McDonald, 456 U.S. 1, 71 L.Ed.2d 696, 102 S.Ct. 1497 (1982). If the Alabama Supreme Court's holding in this case is correct, then the delay of the Respondent's trial was twenty-nine months. However, if the Respondent's speedy trial rights did not attach until his arrest on the indictment, then the delay was eight months.

The Alabama Supreme Court found that the officers in this case were negligent in their efforts to locate the Respondent. Such negligence would be a fact in any such case. If officers fail to locate an indictee, then obviously, their efforts were not effective, and it will always be possible to point to other things they could have and should have done. Thus, the sort of negligence

the deputies were guilty of in this case will be present in any case involving a fugitive or unlocatable indictee.

For these reasons, we respectfully submit that this important issue should be addressed in this case.

## CONCLUSION

In conclusion your Petitioner, the State of Alabama, respectfully submits that in this case the Supreme Court of Alabama, decided two questions under the Sixth Amendment in a manner which conflicts sharply with the teachings of this Honorable Court and erroneously decided an important novel question.

Therefore, Your Petitioner prays that this Honorable Court will issue the writ of certiorari and will review the matters complained of and reverse the

decision of the Supreme Court of Alabama.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL

_____

YVONNE A. HENDERSON
ASSISTANT ATTORNEY GENERAL

_____

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR THE PETITIONER

# APPENDICES

APPENDIX A

ORDERS OF THE COURT OF CRIMINAL APPEALS OF ALABAMA

1086 Ala. 550 SOUTHERN REPORTER, 2d SERIES

DECISIONS OF THE ALABAMA COURT OF CRIMINAL APPEALS WITHOUT OPINIONS - Continued

| TITLE | DOCKET NUMBER | DATE | DISPOSITION |
|---|---|---|---|
| | * * * | | |
| Carrell, Jerry Ray v. State.... | 1 Div. 842 | 6/30/89 | Affirmed |
| | * * * | | |

136 Ala. 553 SOUTHERN REPORTER, 2d SERIES

DECISIONS OF THE ALABAMA COURT OF CRIMINAL APPEALS WITHOUT OPINIONS - Continued

| TITLE | DOCKET NUMBER | DATE | DISPOSITION |
|---|---|---|---|
| | * * * | | |
| Carrell, Jerry Ray v. State.... | 1 Div. 842 | 8/25/89 | Reh.den;Rule 39(k) mot. den. |
| | * * * | | |

APPENDIX B

OPINION AND ORDERS OF THE SUPREME COURT OF ALABAMA

RELEASED

MAY 11, 1991

CLERK
SUPREME COURT OF ALABAMA

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1989-90

Ex parte Jerry Ray Carrell

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re; Jerry Ray Carrell

88-1549 V.

State)

(Mobile Circuit Court, CC-87-2103 through -2105)

MADDOX, JUSTICE.

The sole issue presented in this case is whether the defendant's right to a speedy trial was violated.

This Court granted the defendant's petition for a writ of certiorari to the Court of Criminal Appeals, which had affirmed the defendant's convictions in the Mobile County Circuit Court for two counts of first degree sexual abuse and one count of second degree sexual abuse. The Court of Criminal Appeals did not issue an opinion in the case, see [Ms. 1 Div. 842, June 30, 88-1549 1989] So.2d (Ala. Cr. App. 1989); therefore, we are unaware of the reasons why that Court denied defendant any relief.

In regard to any claim by a defendant that his constitutional right to a speedy trial has been violated, a court must look at the specific facts and circumstances surrounding the particular claim and apply the four-part

test set out in the landmark case of Barker v. Wingo, 407 U.S. 514 (1972). Barker sets out these determinative factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant resulting from the delay.

FACTS

The facts are as follows: Defendant was initially arrested in August 1984, based on an indictment charging him with the same offenses that form the basis for his convictions in these cases. He appeared in court to answer the charges in September 1984, but at that time the charges were nol prossed on motion of the State. After those first charges were dismissed, the

following events transpired:

| | |
|---|---|
| November 18, 1985 | Defendant reindicted by the November 1985 Grand Jury of Mobile County for two (2) counts of first degree sexual abuse and one (1) count of second degree sexual abuse. |

88-1549

| | |
|---|---|
| November 19, 1985 | Sheriff's Department's first attempt to serve the Defendant. |
| March 1987 | Second attempt by Sheriff's Department to locate defendant. |
| August 6, 1987 | Defendant arrested for the charges in the indictment at the place where he had worked for 18 years, and where he had been arrested on the 1984 indictments that were nol prossed. |
| August 17, 1987 | Defendant entered a written plea of not guilty and waived arraignment. |
| September 4, 1987 | Defendant entered a plea of not guilty by reason of a mental defect. |

| | |
|---|---|
| September 16, 1987 | Defendant filed a motion to dismiss and demanded a speedy trial. |
| January 8, 1988 | Hearing on motion to dismiss held and motion taken under submission. |
| February 11, 1988 | Motion to dismiss denied. |
| April 7, 1988 | Defendant entered a plea of guilty.[1] |
| May 18, 1988 | Defendant filed motion for a new trial in which he alleged: "The parties have agreed that the Defendant may |

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[1] The plea of guilty was entered without the defendant's waiving his right to appeal in regard to his "speedy trial" claim. The record shows the following:

"Friday, May 6th, 1988

"This day in open court came the State of Alabama by its District Attorney and thereupon in open court on this day; It is ordered by the Court that the .Order of April 7th, 1g88, be and the same is hereby amended EX [MERO MOTU], and by agreement of parties, to include defendant's reservation of his right to appeal the Court's ruling of February 11th, 1988, denying defendant's Motion to Dismiss filed September 16th, [1987]."

| | |
|---|---|
| | take an appeal of the denial of the court of the Defendant's Motion to Dismiss, and the record is unclear on this matter." |
| July 1, 1988 | Motion for new trial granted. |
| July 1, 1988 | Defendant entered guilty plea to the charges. Defendant was convicted. |
| September 1, 1988 | July 1 conviction set aside, defendant pleaded guilty and upon conviction reserved right to appeal denial of motion to dismiss and defendant gave oral notice of appeal, as follows: "And thereupon in open court at the time of sentence, the defendant gave oral notice of appeal of the [c]ourt's previous ruling of February 11th, 1988, denying defendant's Motion to Dismiss filed September 16th, 1987, and moved the court to suspend the execution of the sentence pending appeal, and to fix the amount of an Appeal Bond." |

September 8, 1988 Defendant filed a written notice of appeal in all three cases.

It is apparent from the facts set out above that defendant's convictions of sexual abuse came almost three years after the return of the second indictment against him by the grand jury, and more than four years after the initial indictment had been returned and the defendant had been arrested thereon.

It is apparent from the record in this case that the defendant, shortly after his arrest on the second indictment, filed a motion to dismiss, in which he included as a ground for dismissal the allegation that his right to a "speedy trial" had been denied. The defendant asks this Court to review only the trial court's denial of his motion to dismiss the indictment on the

"speedy trial" ground. While the defendant's convictions were based upon his entry of pleas of guilty to the charges, the record clearly shows that the trial judge, the district attorney, and the defendant all understood that he had the right to appeal the denial of his "speedy trial" claim.

It is apparent that defendant's conviction occurred more than four years after he was initially indicted on the charges.

He was arrested on the original indictment shortly after its return, at his place of employment in August 1984. As the facts set out above show, those charges were nol prossed on motion of the State's attorney in September 1984, and the defendant was not reindicted until November 18, 1985, over one year later.

The record shows that within a week of the return of the second indictment, the sheriff's department first attempted to serve it upon the defendant and to arrest him. According to testimony of sheriff's deputies, the sheriff returned the warrant because the address of defendant on the arrest warrant was inaccurate.[2] The record also shows that the sheriff had a task force that made an attempt to serve all outstanding arrest warrants, including the defendant's, during the latter part

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[2]There is nothing in the record to indicate that the petitioner was living in a different house or had attempted, in any manner, to avoid service, and the petitioner testified that he did not know that the indictments had been returned until he was arrested upon them in August 1987.

of 1986 and the early part of 1987.[3] The sheriff's justification for not finding the defendant was based on a claim that the address on the warrant was for a house number on Dewitt Street and that the numbering system on that street had been changed, and, although defendant had not moved, the house

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[3]There is some evidence that there may have been an attempt to serve this indictment in March 1987. The record is silent regarding the person or persons responsible for getting an address on the arrest warrant, or for checking with complaining witnesses to learn the whereabouts of the petitioner.

number may have changed.[4] There was no evidence presented to indicate that the defendant attempted to avoid service of the warrant, and the State does not attempt to justify the delay on this ground.

On August 7, 1987, the defendant was arrested at his place of employment. This was the same place of

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[4]The appellant had moved at one point from his mother's house to the house next door, but neither address was the one shown on the warrant, and there is nothing in the record to indicate why the officers of the State responsible for getting the correct address of persons charged in outstanding indictments were unaware of governmental action that may have changed the numbering scheme on Dewitt Street or that defendant was arrested on the first indictment at his place of employment.

employment at which he had been arrested by the sheriff in 1984.[5]

THE RIGHT TO A SPEEDY TRIAL

The State and the defendant agree on one point of law: The right to a speedy trial is triggered when a criminal prosecution has begun. Hayes v. State, 487 So.2d 987 (Ala.Cr.App. 1986). citing United States v. Marion, 404 U.S. 307 (1971), in which the United States Supreme Court stated, inter alia:

> "[I]t is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment."

---

[5]The record does not show why the sheriff had not attempted earlier to serve the second indictment on the defendant at the same place where the sheriff had served him with the first indictment.

United States v. Marion. 404 U.S. 307 at 320 (1971). We agree with the State that the defendant's right to a speedy trial was not triggered by the return of the 1984 indictment, because those charges were nol prossed by the State, but we are not persuaded that the dismissal of those charges, and the delay of over a year before the new indictment was returned, should be completely ignored.[6]

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[6]The record in this case does not show why that first indictment was nol prossed, but if it was nol prossed in order to give the State a prosecutorial advantage, then it would not be completely clear that the delay should not be counted in the total. Petitioner contends that this period of delay should be counted, but cites no authority and presented no evidence other than the fact that the original charges were nol prossed.

In order to decide the precise issue presented by this petition, we accept November 18, 1985, as the date when the defendant's constitutional right to a speedy trial began; that was the date when the second indictment was returned. Although defendant was never tried, because he entered a plea of guilty, with leave to appeal his "speedy trial" claim, we consider that he was "tried" as of the date when he was convicted and sentenced on his plea of guilty on September 1, 1988.

The State and the defendant are in agreement that whether he was denied his right to a speedy trial must be determined in accordance with the four factors set forth in Barker v. Wingo, 407 U.S. 514 (1972), that is, (1) the length of the delay, (2) the reasons for the delay, (3) defendant's assertion of

his right, and (4) prejudice to the defendant resulting from the delay.

Applying these factors to the present facts, we find that the defendant was denied the right to a speedy trial.

(1) Length of delay. Whether the length of delay violates the right to a speedy trial is "necessarily dependent upon the peculiar circumstances of the case." Barker v. Wingo, 407 U.S. at 530, 531. Although the Barker Court recognized that the complexity of the charge would have a bearing on whether the length of delay was reasonable, we find that the offenses charged here are not unusually complex, and should not have required any extra preparation time beyond the time normally allotted to the State to prepare a case. Consequently, we find that under the facts of this

case, the delay in this case was presumptively prejudicial.

(2) Reasons for the delay. It is clear from the facts presented here that the defendant has not shown that the State deliberately delayed his trial in order to gain a prosecutorial advantage.[7] The State argues that the delay was justified because the address on the arrest warrant was incorrect. Defendant argues that the evidence clearly shows that he lived at the same

---

[7]Defendant does argue that the length of delay from the time of the return of the first indictment should be counted, but defendant has not shown the reasons why the State nol prossed the first indictment. We cannot assume that the indictment was nol prossed to give the State a prosecutorial advantage, but we cannot assume otherwise, either. The record just does not show why the indictment was dismissed on motion of the State and why the State decided to seek indictment again approximately one year later.

place where he lived when the first indictment was returned, and that he worked at the same place where he was arrested on the first indictment, and that the record is devoid of any evidence that he deliberately attempted to avoid service of the warrant. We interpret the evidence the same way. The delay, of course, was caused by the failure of the State to serve the arrest warrant on the defendant. The State argues that the delay was justified in this case because the sheriff's department diligently tried to serve the warrant on the defendant. We cannot excuse so easily the failure of the State to serve the warrant. The facts show that the defendant was finally arrested by the sheriff's department at his place of employment. He had been employed there for 18 years and had been

arrested there by someone in the sheriff's department three years before on the same charges. Also, although it is not clear how the improper address was placed on the warrant, it is clear that this was not the fault of the defendant. The failure of the sheriff to serve the warrant was caused by the State's failure to ascertain the whereabouts of the defendant, who admittedly was not trying to evade service of process. The evidence shows that officers of the State responsible for discovering the place where defendant could be found did not attempt to find the defendant's former or present address or to make any attempt to locate him at his place of employment where he had been located before. We think this constitutes negligence by the State, and although negligence is not

weighed as heavily against the State as deliberate delay, it nevertheless must be weighed against the State. Taylor v. State, 429 So.2d 1172 (Ala.Crim.App. 1983). cert. denied, 464 U.S. 950 (1983); consequently, we find that the State's neglect to arrest the defendant in this case in a timely manner is weighty enough to raise a presumption of prejudice to the defendant in this case.

(3) The defendant's assertion of his right. The defendant timely asserted his rights in this case by filing his motion to dismiss demanding a speedy trial approximately five weeks after his arrest. He testified that, prior to his arrest, he did not know that the charges were outstanding, and there is absolutely no evidence that he knew that he had been reindicted on the

same charges that had been previously dismissed.

(4) Prejudice to the defendant. The defendant contends that he was prejudiced by the delay because, he says, his memory has faded. Although ordinarily a mere assertion of a loss of memory is not enough of a showing of prejudice to support a finding that a defendant has been denied due process, where the delay is excessive and is the result of unexcused inaction by the State, the delay is prima facie prejudicial. Murray v. Wainwright, 450 F.2d 465 (5th Cir. 1971); United States ex rel. Solomon v. Mancusi, 412 F.2d 88 (2d Cir.). cert. denied, 396 U.S. 936 (1969). We find that the delay in this case was of such length that defendant's right to a speedy trial has been violated. While the record does not

show why the initial charges were dismissed, it would appear that defendant, at the time of the dismissal, had a right to assume that he would not be charged again, and unexcused inaction in a case involving alleged sexual misconduct involving children could be especially prejudicial to a defendant, because the prosecution must depend on the testimony of the alleged victims in many cases. Defendant entered a plea of guilty with a reservation of his right to insist on his "speedy trial" claim; the validity of that claim does not depend upon whether he is guilty or not guilty of the charges levied against him. The right to a speedy trial is a right guaranteed to every citizen by the state and federal constitutions and it acts as a limitation on State or Government action without regard to the

guilt or innocence of the defendant, and in that regard is not unlike the right of a defendant to have illegal drugs excluded from evidence because they were obtained unconstitutionally by State or Government action.

Based upon the above, we find, under all the facts and circumstances of this case, that the defendant was denied his right to a speedy trial. In making this determination, of course, we do not decide whether the defendant is guilty of the charges levied against him. The judgments are, therefore, reversed and rendered.

REVERSED AND RENDERED.

Hornsby, C.J., and Jones, Adams, Houston, and Kennedy, JJ., concur.

Shores, J., dissents.

THE STATE OF ALABAMA- JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

June 15, 1990

88-1549

Ex parte Jerry Ray Carrell

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Jerry Ray Carrell v. State)

(CRC 1/842 (Mobile CC-87-2103; 87-2104; 87-2105))

ORDER

IT IS ORDERED that the application for rehearing filed in the above cause on May 25, 1990, be, and the same is hereby, overruled. NO OPINION.

MADDOX, J.- Hornsby, CJ., Jones, Adams, Houston and Kennedy, JJ., concur;
Shores, J., dissents.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same

appear(s) of record in said Court.
Witness my hand this 5th day of Sept.
1990
/s/ Robert G. Esdale
Clerk, of the Supreme Court of
Alabama

THE STATE OF ALABAMA- JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

August 13, 1990

88-1549

Ex parte Jerry Ray Carrell

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Jerry Ray Carrell v. State)

(CCA 1/842 (Mobile CC-87-2103; 87-2104; 87-2105))

The respondent having filed a motion to recall and stay certificate of judgment in this cause pending review by the U.S. Supreme Court, and said motion having been duly considered by the Court,

IT IS ORDERED AND ADJUDGED that said motion to recall and stay certificate of judgment in this cause be, and the same is hereby, denied.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full,

true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court. Witness my hand this 13th day of Aug. 1990

/s/ Robert G. Esdale
Clerk, of the Supreme Court of Alabama

## APPENDIX C

## RELEVANT ALABAMA STATUTES

### CODE OF ALABAMA, 1975

### TITLE 13A

§13A-6-66. SEXUAL ABUSE IN THE FIRST DEGREE.

(a) A person commits the crime of sexual abuse in the first degree if:

(1) He subjects another person to sexual contact by forcible compulsion; or

(2) He subjects another person to sexual contact who is incapable of consent by reason of being physically helpless or mentally incapacitated; or

(3) He, being 16 years old or older, subjects another person to sexual contact who is less than 12 years old.

(b) Sexual abuse in the first degree is a Class C felony.

§13A-6-67. SEXUAL ABUSE IN THE SECOND DEGREE.

(a) A person commits the crime of sexual abuse in the second degree if:

(1) He subjects another person to sexual contact who is incapable of consent by reason of some factor ,

other than being less than 16 years old; or

(2) He, being 19 years old or older, subjects another person to sexual contact who is less than 16 years old, but more than 12 years old.

(b) Sexual abuse in second degree is a Class A misdemeanor.

TITLE 15

§15-8-70. PRESENTATION TO COURT AND ENDORSEMENT; LIMITATIONS ON ENTRY IN MINUTES AND INSPECTION.

All indictments must be presented to the court by the foreman of the grand jury in the presence of at least 11 other jurors, must be endorsed "filed" and must have the endorsement dated and signed by the clerk; but no entry of an indictment found must be made on the minutes, nor must any indictment be inspected by any other person than the district attorney, the presiding judge and the clerk of the court until the defendant has been arrested or has given bail for his appearance.

## APPENDIX D

## IN RE: THE STATUTE OF LIMITATIONS

No issue was raised below relative to the statute of limitations, but the statute is relevant under some theories relating to the post-indictment, pre-arrest speedy trial issue. Therefore, we present here a brief analysis of the statute of limitations relative to the Respondent's crimes.

The Respondent committed sexual abuse in the first degree on two little girls on March 2, 1984. Sexual abuse in the first degree, as is relevant to this case, is defined as follows:

> "§13A-6-66. SEXUAL ABUSE IN THE FIRST DEGREE.
>
> "(a) A person commits the crime of sexual abuse in the first degree if:...
>
> "(3) He, being 16 years old or older, subjects another person to sexual contact who is less than 12 years old.

"(b) Sexual abuse in the first degree is a Class C felony." (Code of Alabama, 1975)

On the same date, he committed sexual abuse in the second degree on a third child. This crime is defined as follows:

"§13A-6-67. SEXUAL ABUSE IN THE SECOND DEGREE.

"(a) A person commits the crime of sexual abuse in the second degree if:...

"(2) He, being 19 years old or older, subjects another person to sexual contact who is less than 16 years old, but more than 12 years old.

"(b) Sexual abuse in the second degree is a Class A misdemeanor." (Ibid)

On the date of the crimes, sexual abuse in the first and second degree had statutes of limitations of three years and one year respectively. The relevant statutes read:

"§15-3-1. FELONIES GENERALLY

"The prosecution of all felonies, except those specified in sections 15-3-3 and 15-3-5, must be commenced within three years after the commission of the offense." (Ibid.)

And:

"§15-3-2. MISDEMEANORS.

"Unless otherwise provided, the prosecution of all misdemeanors before a circuit or district court must be commenced within 12 months after the commission of the offense." (Ibid.)

These statutes had not run on January 7, 1985, when the Alabama legislature amended Section 15-3-5 of the Code to read, in pertinent part, as follows:

"§15-3-5. OFFENSES HAVING NO LIMITATION.

"(a) There is no limitation of time within which a prosecution must be commenced for:...

"(4) Any sex offense involving a victim under 16 years of age, regardless of

whether it involves force or serious physical injury or death;...

"(b) The amendments made by this act shall apply:...

"(2) To all crimes committed before January 7, 1985, for which no statute of limitations provided under pre-existing law has run as of January 7, 1985...." (Ibid.)

As is well recognized:

"Where a statute extends the period of limitation, the extension applies to offenses not barred at the time of the passage of the act, so that a prosecution may be commenced at any time within the newly established period... Such a statute, however, cannot operate to revive offenses that were barred at the time of its enactment, since that would make the statute ex post facto...." (21 Am. Jur.2d, Criminal Law, Section 224)

Therefore, the Respondent's crimes have no statute of limitations. See State v. Whitley, 530 So.2d 861, 864 (Ala. Crim. App, 1987); reversed on

other grounds, sub nom Ex parte Whitley, 530 So.2d 865 (Ala, 1988).

## CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, hereby certify that on this _____ day of September, 1990, I did serve the requisite number of copies of the forgoing on the Attorneys for Jerry Ray Carrell, Respondent, by mailing the same to said Attorneys, first class postage prepaid and addressed as follows:

Honorable Thomas M. Haas &
Honorable N. Ruth Haas
Attorneys at Law
255 St. Francis Street
Mobile, Alabama 36602

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

ADDRESS OF COUNSEL:
Office of the Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

2309P

ORIGINAL

Supreme Court, U.S.
FILED
DEC 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

RESPONSE REQUIRED

IN THE UNITED STATES SUPREME COURT

STATE OF ALABAMA, )
Petitioner, )
vs. ) CASE NO. 90-444
JERRY RAY CARRELL, )
Respondent. )

RECEIVED
DEC 7 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now the Respondent, by and through counsel, and moves this Honorable Court for leave to proceed in forma pauperis pursuant to Rule 39 of the Supreme Court Rules stating in support as follows:

1. Respondent is without the necessary funds to pay the costs of these proceedings. Respondent has been unable to pay the retainer of his attorney for this appeal nor has he been able to acquire the funds to pay for printing the brief. See affidavit attached hereto.

2. Respondent is employed with a net salary of $160.00 per week. Said sum is not even able to support his family.

3. Respondent has been unable to pay his utility bills resulting in the cut-off of his telephone and temporary use of power in his home.

4. Respondent has purchased his mother's home within the

last year. Said home does not have any equity in it that can be borrowed against to acquire any funds for payment of this appeal process.

5. Respondent does not own anything of value that can be sold to acquire said funds.

WHEREFORE, Respondent respectfully moves this Honorable Court for leave to proceed in forma pauperis for the above stated reasons.

Respectfully submitted,

THOMAS M. HAAS
N. RUTH HAAS
Attorneys for Respondent
258 State Street
Mobile, Alabama 36603
(205) 432-0457

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing on the Honorable Joseph Marston, Assistant Attorney General, Alabama State House, 11 South Union Street, Montgomery, Alabama 36130, by depositing a copy of same in the United States mail, properly addressed and postage prepaid on this the 4th day of December, 1990.

THOMAS M. HAAS

IN THE SUPREME COURT OF THE UNITED STATES

| | | |
|---|---|---|
| STATE OF ALABAMA, | ) | |
| Petitioner, | ) | |
| vs. | ) | CASE NO. 90-444 |
| JERRY RAY CARRELL, | ) | |
| Respondent. | ) | |

AFFIDAVIT

Personally appeared before me, the undersigned Notary Public, in and for said county in said state, JERRY RAY CARRELL, who, being first duly sworn, did depose and say as follows:

1. I am the Respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay any fees or costs, I state that because of my poverty I am unable to pay the cost of said proceeding, and I am unable to pay anything toward the fee of my attorney.

2. I am presently employed, bringing home the approximate sum of $160.00 per week.

3. I do not receive any other income from a business, profession or other form of self-employment.

4. I do not have any monies in checking or savings accounts.

5. I purchased and moved into my mother's home about one year ago but said home does not have any equity in it to borrow

against to acquire the funds to pay for these proceedings.

6. I do not own anything else of value that could be sold to acquire these funds.

7. I have a wife and a young son who are dependent on me for support.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this the 5th day of November, 1990.

JERRY RAY CARRELL

Sworn and subscribed to before me on this the 5th day of November, 1990.

Notary Public, Mobile County, AL

ORIGINAL

NO. 90-444

IN THE SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1990

STATE OF ALABAMA,

Petitioner,

vs.

JERRY RAY CARRELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

---

# RESPONDENT'S BRIEF AND ARGUMENT IN OPPOSITION

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NO. 90-444

IN THE SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1990

STATE OF ALABAMA,

Petitioner,

vs.

JERRY RAY CARRELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

---

RESPONDENT'S BRIEF AND ARGUMENT IN OPPOSITION

---

## STATEMENT OF THE CASE

The Respondent was initially arrested in August, 1984; he appeared in a lower court for a preliminary hearing on the charges against him of two counts of first degree sexual abuse and one count of second degree sexual abuse. The charges were nol prossed on motion of the State of Alabama.

Following dismissal of the charges, the Respondent was indicted November 18, 1985, for the same offenses. The sheriff's department attempted to arrest or serve the Respondent on two occasions: November 19, 1985, and in March, 1987. On August 6,

1987, the Respondent was arrested on the charges in the indictment at his work place, where he had worked for eighteen (18) years, and where he had previously been arrested in August, 1984, for the same offenses.

The Respondent entered a plea of not guilty on August 17, 1987, and a plea of not guilty by reason of a mental defect on September 16, 1987. He filed a motion to dismiss raising his denial of a speedy trial on September 16, 1987. After a February 8, 1988, hearing, the motion was denied on February 11, 1988. The Respondent entered a plea of guilty without waiving his right to appeal his "speedy trial" denial on April 7, 1988.

The Respondent filed a motion for new trial on May 18, 1988, stating the parties had agreed that Respondent could take an appeal of the trial court's denial of Respondent's motion to dismiss and noting the record was unclear on this matter. On July 1, 1988, the new trial motion was granted and the Respondent entered a guilty plea and was convicted.

On September 1, 1988, the July 1 conviction was set aside and the Respondent pleaded not guilty; upon conviction he again reserved the right to appeal the trial court's denial of the motion to dismiss. On September 8, 1988, the Respondent filed a written notice of appeal.

A. THE DELAY IN SERVING THE RESPONDENT.

The sheriff's department was negligent in its efforts to serve the arrest warrant on Respondent between his November, 1985, indictment and his August, 1987, arrest. On November 19, 1985, the sheriff's department made its first attempt. Deputies testified the warrant was returned because the Respondent's address was inaccurate. However, the record indicates that the Respondent had resided on Dewitt Avenue in his own home for several years and had previously lived in his mother's house immediately next door on Dewitt Avenue, where she had lived for forty (40) years. (TR. p. 4).

Some evidence indicates a second attempt may have been made to serve or arrest the Respondent in March, 1987.

Finally, the Respondent was arrested at work on August 7, 1987, twenty-one (21) months following his reindictment. Although the Respondent had worked in the same place for eighteen (18) years and had previously been arrested there by the sheriff's department in 1984 for the same offenses, no effort was made to serve him there in the twenty-one (21) months prior to his arrest.

From the record, it is clear, far from "actively" seeking the Respondent as the State claims, the sheriff's department made little effort to serve or arrest the Respondent and avoid the delay which resulted in this case. Deputy Paul, who attempted to serve the Respondent in November, 1985, testified that he did not

check sheriff's records on the Respondent and did not knock on any doors or make any inquiries on Dewitt Avenue. (TR. p. 18-21).

It is difficult to imagine an individual easier to locate than the Respondent. He lived and worked in the same places for many years and had previously been arrested at his place of work by the very department responsible for serving his subsequent arrest warrant. The Alabama Supreme Court rightfully held that the State's minimal efforts to serve the Respondent were negligent. It is appalling that the State of Alabama concludes that such negligence would be a fact in any case. (Pet. at p. 41). Contrary to the State's assertion that:

> " * * *it will always be possible to point to other things they could have and should have done,"

only will it be possible where, as here, the State is negligent in a minimal effort to serve a defendant over a long period of time resulting in an unreasonable and inexcusable delay and depriving a defendant of his fundamental right to a speedy trial.

B. PREJUDICE RESULTING FROM THE DELAY

The Respondent's conviction occurred more than four years after he was originally indicted and almost three years after his reindictment on the same charges. The Respondent raised the denial of his right to a speedy trial at the earliest

opportunity, in his September, 1987, motion to dismiss and reiterated it at every opportunity, reserving the right to appeal the denial when entering guilty pleas and upon conviction. Further, the Respondent testified that while he remembered the accusations and part of the offenses, he did not remember everything involved that had happened or all that he had stated to police officers. (Tr. p. 6-7).

Further, when a delay is excessive and the result of unexcused inaction by the State, it is prima facie prejudicial. Murray v. Wainwright, 450 F.2d 465 (5th Cir. 1971); United States ex rel. Solomon v. Mancusi, 412 F.2d 88 (2nd Cir.), cert. denied, 396 U.S. 936 (1969). As noted by the Supreme Court of Alabama in its opinion, "unexcused inaction in a case involving alleged sexual misconduct involving children could be especially prejudicial to a defendant, because the prosecution must depend on the testimony of the alleged victims in many cases." (App. A. p. 11).

## SUMMARY OF THE ARGUMENT

1. (1) The Alabama Supreme Court ruled, in accord with Barker v. Wingo, 407 U.S. 514, 33 L.Ed.2d 101 (1972), holding that the Respondent was denied his right to a speedy trial based upon an application of the Barker factors to the present case.

(b) The Alabama Supreme Court's holding provides no conflict with United States v. McDonald, 456 U.S. 1, 71 L.Ed.2d 696 (1982), since it is based upon the return of the second indictment as the time period when his right to a speedy trial began.

2. (a) No novel question exists for this Honorable Court to decide; the principles articulated in Barker v. Wingo, 407 U.S. 514, 33 L.Ed.2d 101 (172), dictate that the State's negligence as a reason for delay, in regards to the right to a speedy trial, should be addressed after indictment or arrest.

(b) The jurisdictions are in accord on the issues of when the right to a speedy trial is triggered: the right begins upon indictment or else the actual restraints imposed by arrest. United States v. Marion, 404 U.S. 307, 320 (1971).

(c) This case involves an individual the State negligently failed to timely serve or arrest, resulting in a prejudicial inexcusable delay depriving the Respondent of his right to a speedy trial. It is not the proper vehicle, should such be necessary, to decide how indictees unarrested, due to their fugitive or unlocatable status, should be handled.

## ARGUMENT

### I.

### THE DECISION OF THE ALABAMA SUPREME COURT IS CONSTITUTIONAL.

The Alabama Supreme Court reversed and rendered the Respondent's conviction, with one justice dissenting, on the basis of the violation of Respondent's right to a speedy trial. The Court, citing United States v. Marion, 404 U.S. 307, 30 L.Ed.2d 468 (1971), holds that the Respondent's right to a speedy trial was triggered when a criminal prosecution began with Respondent's November, 1985, indictment. United States v. Marion, 404 U.S. 307 at 320, 30 L.Ed.2d 468 at 478, (1971). However, while accepting November 18, 1985, as the date when the Respondent's constitutional right to a speedy trial began, the court stated that it was not persuaded that the 1984 dismissal of the charges, and delay of over a year before an indictment was returned, should be completely ignored. The State of Alabama blatantly misstates the Alabama Supreme Court in claiming that the Supreme Court "expressly rejected any suggestion" that the State delayed Respondent's trial in order to gain a prosecutorial advantage. (Pet. at p. 15). The Supreme Court stated as follows:

> "We cannot assume that the indictment was nol prossed to give the state a prosecutorial advantage, but we cannot assume otherwise, either. The record just does not show why the indictment was dismissed on motion of the state and why the state decided to seek indictment again approximately one year later." (App. A, p. 9).

The Supreme Court states that the Respondent and the State of Alabama agree as to when the right to a speedy trial is triggered and also agree that whether Respondent was denied this right must be determined under the four factors of Barker v. Wingo, 407 U.S. 514, 33 L.Ed.2d 101 (1972). Applying the Barker factors, length of delay, reason for delay, the defendant's assertion of his right, and prejudice to the defendant, the Supreme Court holds the Respondent was denied his right to a speedy trial.

A.

THE OPINION OF THE ALABAMA SUPREME COURT IS IN ACCORD WITH BARKER V. WINGO, (407 U.S. 514 [1972])

Despite the Supreme Court's reliance on Barker v. Wingo, supra, the Court's analysis of the four factors and its application of those factors to the present facts, the State of Alabama claims that the Supreme Court's opinion is in conflict with Barker, citing Moore v. Arizona, 414 U.S. 25, 38 L.Ed.2d 183 (1973), the State asserts as follows:

> "In the instant case, the Alabama Supreme Court found prejudice solely, as a practical matter, on the basis of the length of the delay." (Pet. at p. 26).

In so stating, the State of Alabama misunderstands both the law of Moore and the Alabama Supreme Court's opinion. Prejudice is merely one of the four considered factors; the length of the delay is a separate factor and is of no more or less than equal significance. It is the State, and not the Supreme Court, that

misapplies the law by attaching controlling significance to the fourth factor, prejudice, and by ignoring the other three.

Consistent with the Alabama Supreme Court's reasoning and holding, an accurate reading of Barker v. Wingo, supra, and analysis of the "four factors," in light of the facts, reveals the following:

> (1) the length of the delay, from indictment to arrest, was unreasonable and presumptively prejudicial,
>
> (2) the reason for the delay was the State's inexcusable negligence,
>
> (3) the Respondent properly asserted his right at the earliest opportunity, and
>
> (4) the Respondent was prejudiced by a loss of memory coupled with excessive delay and unexcused inaction. (App. A at p. 8-12).

The State, in its concentration of the fourth factor, misstates the facts in claiming the Respondent contradicted himself on cross-examination. (Pet. at p. 27). The Respondent stated he remembered the accusations and his part in the offenses, but did not remember everything that had happened or all of his statements to police officers. (TR. pp. 6-7). It is unreasonable to expect anything else after four years had passed, a fact in part reflected in this Honorable Court's concern that delay would impair the defense. Barker v. Wingo, 407 U.S. 514 and 532, 33 L.Ed.2d 101, 118 (1972). The State, however, permits itself to speculate about the impairment of the Respondent's memory, again misstating the facts, by claiming Respondent testified he forgot "everything." (Pet. at p. 27). The record

clearly indicates that Respondent made no such claim. (TR. pp. 6-7). Finally, the State asserts that the other factors "have no possible application," (Pet. at p. 28), except to a possible period of nine months calculated by the Petitioner from Respondent's initial 1984 arrest to dismissal and his 1987 arrest to his first guilty plea. Even by its own reasoning, the State contradicts itself. The remaining period is dismissed because the indictment was withheld from the public and the Respondent knew nothing of it; the Petitioner chooses to ignore the period following the Respondent's first guilty plea and the possibility of memory loss impairing the defense.

Finally, the State misstates again the Alabama Supreme Court in claiming that court held a forty-four (44) month delay is per se so prejudicial as to outweigh all other considerations. (Pet. at p. 29). The court neither based its holding on a forty-four (44) month period nor outweighed the other factors. The period was thirty-four (34) months and, as a reading of that opinion clearly reveals, each factor was weighed and analyzed. (App. A at pp. 4, 8-12).

No manifest conflict exists between this Honorable Court's holdings and that of the Alabama Supreme Court. Thus, the writ should be denied.

B.

NO CONFLICT WITH UNITED STATES V. MCDONALD, (456 U.S. 1 [1982]), EXISTS.

Because the Alabama Supreme Court based its holding on its

acceptance of the returning of the indictment as the date when the Respondent's right to a speedy trial began, no conflict exists with United States v. Jeffrey McDonald, 456 U.S. 1, 71 L.Ed.2d 696 (1982). Therefore, the writ cannot issue on these grounds.

## II.

## NO NOVEL QUESTION, CONFLICT AMONG THE JURISDICTIONS, OR SPECIAL REASONS EXIST TO JUSTIFY GRANTING OF THE WRIT.

### A.

### NOVEL QUESTION

The State of Alabama submits that this Honorable Court should grant the writ in order to answer in the negative the question of whether the time during which an indictee cannot be located is subject to speedy trial analysis.

The State, in so framing the issue, asks this Court to go beyond the facts of this case. The Respondent could have been located quite easily, and would have been, avoiding these subsequent lengthy appeals, but for the State's negligence.

Further, the State is submiting that such negligence, the reason for the delay, should not be addressed by any court. It simply should not be counted, the State asserts, if the individual has not been arrested, ignoring the fact that in this case, the Respondent was not timely arrested due to the State's negligent failure to do so. Such reasoning clearly flies in the

face of Barker v. Wingo, supra, and the principles articulated therein, and does not provide a novel question requiring the granting of the writ.

B.

CONFLICTS AMONG THE JURISDICTIONS

The State of Alabama suggests that a conflict among the jurisdictions exists regarding whether or not time between indictment and arrest should count for speedy trial purposes. In advancing it's theory, the State correctly notes that most state courts, including the Alabama Supreme Court and the United States Court of Appeals, have held that indictment or arrest triggers the speedy trial right. (Pet. at pp. 33, 34, 36, and 37).

The Petitioner relies heavily on United States v. Hay, 527 F.2d 990 (10th Cir. 1975), cert. denied, 425 U.S. 935, 48 L.Ed.2d 176, 96 S.Ct. 1666. That court held that delay between the time of indictment and defendant's arrest could not be considered in determining a speedy trial claim because this defendant was not available for prosecution. The court further held that an analysis of the Barker v. Wingo four factors revealed that the seventeen (17) month delay in this complex conspiracy case was outweighed by the government's legitimate reasons for delay, such as obtaining a material witness. United States v. Hay, 527 F.2d 990 at 994. The Hay court cited Barker v. Wingo as follows in a footnote:

> "[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." Barker v. Wingo, 407 U.S. 514, 531, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972).

United States v. Hay, 527 F.2d 990, 994. The Hay court also noted that, unlike the Respondent's case, the government discharged its "constitutional duty to make a diligent, good-faith effort" (citations omitted) to bring the defendant to trial. Id, at 996. Finally, the Hay court held:

> "Preventing this harm (of restricting the defendant) is a primary concern of the speedy trial guarantee, Moore v. Arizona, 414 U.S 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973); Barker v. Wingo, supra, but it is not as important a consideration as impairment of the defense function. . . United States v. Detienne, 468 F.2d 151 (7th Cir. 1972), cert. denied, 410 U.S. 911, 93 S.Ct. 974, 35 L.Ed.2d 274." (Emphasis added).

Id. at 996.

Thus, the Hay court's reasoning clearly contradicts the State's reliance on it and the State's argument that pre-arrest post-indictment delay ought to be ignored because the defendant is not restricted and may not be anxious or scorned. Indeed, the court seems to answer the State's issue in its reasoning as noted above.

Likewise, in United States v. Watson, 599 F.2d 1149 (2nd Cir. 1979), the government acted in good faith in attempting to find defendantsand bring them to trial, a different setting than that of Respondent. United States v. Watson, 599 F.2d 1149, 1153.

The State's argument, despite myriad court holdings that the right to a speedy trial begins at indictment or arrest, that a conflict exists among the jurisdictions, is based upon the

State's misperception of the law governing the Sixth Amendment right to a speedy trial. Barker v. Wingo addresses the issue most adequately. The concerns behind the right to a speedy trial are not simply the defendant's restriction and anxiety so stressed by the state; other concerns include:

(1) the societal interest in avoiding a large backlog of cases,

(2) persons awaiting trial can commit other crimes,

(3) the possibility of escape of the accused,

(4) witnesses memories fade, and

(5) society's duty to swiftly prosecute.

Barker v. Wingo, 407 U.S. 514, 33 L.Ed.2d 101 (1972). The State's argument completely ignores these and other concerns not persuasive to its case.

No conflict exists among the jurisdictions sufficient to justify granting of the writ. The jurisdictions are in agreement that the right to a speedy trial begins at indictment or arrest.

C.

SPECIAL REASONS

The State of Alabama states that the writ should issue in order for this Honorable Court to address what should be done about unexecuted warrants in cases such as fugitives avoiding discovery and persons who cannot be located. The State characterizes this as "delay occasioned by unsuccessful efforts to locate and arrest" these individuals and states that this

Honorable Court has never examined this issue. (Pet. at p. 40).

First, the issue as stated by the State, is irrelevant for purposes of the State's petition. The Respondent was not a fugitive or person who could not be located; the delay in his case resulted from the State's negligence, not unsuccessful efforts to locate him.

Second, the issue of fugitives and those who cannot be found after due diligence is logically addressed under the second Barker factor, reasons for the delay, when it is factually appropriate.

Third, the starting point for attachment of Respondent's speedy trial rights is, and must be, upon his indictment for this fundamental right to retain any meaning.

Lastly, the State suggests that we mustn't second guess the State in its efforts, or lack thereof, to serve this Respondent or any other individual. After all, the State asserts, they could always do more. (Pet. at p. 41). This nonpersuasive reasoning would permit the State, literally, to do nothing. The Petitioner even equates the negligence in this case with failure to find and serve a fugitive or unlocatable indictee. The Respondent was neither; the State's argument must fail on this and its other points.

It is respectfully submitted that no reasons sufficient to justify the grant of this writ have been asserted.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

THOMAS M. HAAS
N. RUTH HAAS
Attorneys for Respondent
258 State Street
Mobile, Alabama 36603
(205) 432-0457

## CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing on the Honorable Joseph Marston, Assistant Attorney General, Alabama State House, 11 South Union Street, Montgomery, Alabama 36130, by depositing a copy of same in the United States mail, properly addressed and postage prepaid on this the 4th day of December, 1990.

THOMAS M. HAAS

# APPENDIX

MAY 11 1990

THE STATE OF ALABAMA - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1989-90

Ex parte Jerry Ray Carrell

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: Jerry Ray Carrell

88-1549 v.

State)

(Mobile Circuit Court, CC-87-2103 through -2105)

MADDOX, JUSTICE.

The sole issue presented in this case is whether the defendant's right to a speedy trial was violated.

This Court granted the defendant's petition for a writ of certiorari to the Court of Criminal Appeals, which had affirmed the defendant's convictions in the Mobile County Circuit Court for two counts of first degree sexual abuse and one count of second degree sexual abuse. The Court of Criminal Appeals did not issue an opinion in the case, see [Ms. 1 Div. 842, June 30,

1989] ___ So.2d ___ (Ala. Cr. App. 1989); therefore, we are unaware of the reasons why that Court denied defendant any relief.

In regard to any claim by a defendant that his constitutional right to a speedy trial has been violated, a court must look at the specific facts and circumstances surrounding the particular claim and apply the four-part test set out in the landmark case of Barker v. Wingo, 407 U.S. 514 (1972). Barker sets out these determinative factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant resulting from the delay.

FACTS

The facts are as follows: Defendant was initially arrested in August 1984, based on an indictment charging him with the same offenses that form the basis for his convictions in these cases. He appeared in court to answer the charges in September 1984, but at that time the charges were nol prossed on motion of the State. After those first charges were dismissed, the following events transpired:

| | |
|---|---|
| November 18, 1985 | Defendant reindicted by the November 1985 Grand Jury of Mobile County for two (2) counts of first degree sexual abuse and one (1) count of second degree sexual abuse. |

| | |
|---|---|
| November 19, 1985 | Sheriff's Department's first attempt to serve the Defendant. |
| March 1987 | Second attempt by Sheriff's Department to locate defendant. |
| August 6, 1987 | Defendant arrested for the charges in the indictment at the place where he had worked for 18 years, and where he had been arrested on the 1984 indictment that were nol prossed. |
| August 17, 1987 | Defendant entered a written plea of not guilty and waived arraignment. |
| September 4, 1987 | Defendant entered a plea of not guilty by reason of a mental defect. |
| September 16, 1987 | Defendant filed a motion to dismiss and demanded a speedy trial. |
| January 8, 1988 | Hearing on motion to dismiss held and motion taken under submission. |
| February 11, 1988 | Motion to dismiss denied. |
| April 7, 1988 | Defendant entered a plea of guilty.[1] |

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[1]The plea of guilty was entered without the defendant's waiving his right to appeal in regard to his "speedy trial" claim. The record shows the following:

"Friday, May 6th, 1988

"This day in open court came the State of Alabama by its District Attorney and thereupon in open court on this day; It is ordered by the Court that the Order of April 7th, 1988, be and the same is hereby amended EX [MERO MOTU], and by agreement of parties, to include defendant's reservation of his right to appeal the

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| May 18, 1988 | Defendant filed motion for a new trial in which he alleged: "The parties have agreed that the Defendant may take an appeal of the denial of the court of the Defendant's Motion to Dismiss, and the record is unclear on this matter." |
| July 1, 1988 | Motion for new trial granted. |
| July 1, 1988 | Defendant entered guilty plea to the charges. Defendant was convicted. |
| September 1, 1988 | July 1 conviction set aside, defendant pleaded guilty and upon conviction reserved right to appeal denial of motion to dismiss and defendant gave oral notice of appeal, as follows: "And thereupon in open court at the time of sentence, the defendant gave oral notice of appeal of the [c]ourt's previous ruling of February 11th, 1988, denying defendant's Motion to Dismiss filed September 16th, 1987, and moved the court to suspend the execution of the sentence pending appeal, and to fix the amount of an Appeal Bond." |
| September 8, 1988 | Defendant filed a written notice of appeal in all three cases. |

It is apparent from the facts set out above that defendant's convictions of sexual abuse came almost three years after the return of the second indictment against him by the

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Court's ruling of February 11th, 1988, denying defendant's Motion to Dismiss filed September 16th, [1987]."

grand jury, and more than four years after the initial indictment had been returned and the defendant had been arrested thereon.

It is apparent from the record in this case that the defendant, shortly after his arrest on the second indictment, filed a motion to dismiss, in which he included as a ground for dismissal the allegation that his right to a "speedy trial" had been denied. The defendant asks this Court to review only the trial court's denial of his motion to dismiss the indictment on the "speedy trial" ground. While the defendant's convictions were based upon his entry of pleas of guilty to the charges, the record clearly shows that the trial judge, the district attorney, and the defendant all understood that he had the right to appeal the denial of his "speedy trial" claim.

It is apparent that defendant's conviction occurred more than four years after he was initially indicted on the charges.

He was arrested on the original indictment shortly after its return, at his place of employment in August 1984. As the facts set out above show, those charges were nol prossed on motion of the State's attorney in September 1984, and the defendant was not reindicted until November 18, 1985, over one year later.

The record shows that within a week of the return of the second indictment, the sheriff's department first attempted to serve it upon the defendant and to arrest him. According to

testimony of sheriff's deputies, the sheriff returned the warrant because the address of defendant on the arrest warrant was inaccurate.[2] The record also shows that the sheriff had a task force that made an attempt to serve all outstanding arrest warrants, including the defendant's, during the latter part of 1986 and the early part of 1987.[3] The sheriff's justification for not finding the defendant was based on a claim that the address on the warrant was for a house number on Dewitt Street and that the numbering system on that street had been changed, and, although defendant had not moved, the house number may have changed.[4] There was no evidence presented to indicate that the defendant attempted to avoid service of the warrant, and the State does not attempt to justify the delay on this ground.

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[2]There is nothing in the record to indicate that the petitioner was living in a different house or had attempted, in any manner, to avoid service, and the petitioner testified that he did not know that the indictments had been returned until he was arrested upon them in August 1987.

[3]There is some evidence that there may have been an attempt to serve this indictment in March 1987. The record is silent regarding the person or persons responsible for getting an address on the arrest warrant, or for checking with complaining witnesses to learn the whereabouts of the petitioner.

[4] The appellant had moved at one point from his mother's house to the house next door, but neither address was the one shown on the warrant, and there is nothing in the record to indicate why the officers of the State responsible for getting the correct address of persons charged in outstanding indictments were unaware of governmental action that may have changed the numbering scheme on Dewitt Street or that defendant was arrested on the first indictment at his place of employment.

On August 7, 1987, the defendant was arrested at his place of employment. This was the same place of employment at which he had been arrested by the sheriff in 1984.[5]

THE RIGHT TO A SPEEDY TRIAL

The State and the defendant agree on one point of law: The right to a speedy trial is triggered when a criminal prosecution has begun. Hayes v. State, 487 So.2d 987 (Ala.Cr.App. 1986), citing United States v. Marion, 404 U.S. 307 (1971), in which the United States Supreme Court stated, inter alia:

> "[I]t is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment."

United States v. Marion, 404 U.S. 307 at 320 (1971). We agree with the State that the defendant's right to a speedy trial was not triggered by the return of the 1984 indictment, because those charges were nol prossed by the State, but we are not persuaded that the dismissal of those charges, and the delay of over a year before the new indictment was returned, should be completely ignored.[6]

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[5]The record does not show why the sheriff had not attempted earlier to serve the second indictment on the defendant at the same place where the sheriff had served him with the first indictment.

[6]The record in this case does not show why that first indictment was nol prossed, but if it was nol prossed in order to give the State a prosecutorial advantage, then it would not be completely clear that the delay should not be counted in the

In order to decide the precise issue presented by this petition, we accept November 18, 1985, as the date when the defendant's constitutional right to a speedy trial began; that was the date when the second indictment was returned. Although defendant was never tried, because he entered a plea of guilty, with leave to appeal his "speedy trial" claim, we consider that he was "tried" as of the date when he was convicted and sentenced on his plea of guilty on September 1, 1988.

The State and the defendant are in agreement that whether he was denied his right to a speedy trial must be determined in accordance with the four factors set forth in Barker v. Wingo, 407 U.S. 514 (1972), that is, (1) the length of the delay, (2) the reasons for the delay, (3) defendant's assertion of his right, and (4) prejudice to the defendant resulting from the delay.

Applying these factors to the present facts, we find that the defendant was denied the right to a speedy trial.

(1) Length of delay. Whether the length of delay violates the right to a speedy trial is "necessarily dependent upon the peculiar circumstances of the case." Barker v. Wingo, 407 U.S. at 530, 531. Although the Barker Court recognized that the complexity of the charge would have a bearing on whether the length of delay was reasonable, we find that the offenses

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total. Petitioner contends that this period of delay should be counted, but cites no authority and presented no evidence other than the fact that the original charges were nol prossed.

charged here are not unusually complex, and should not have required any extra preparation time beyond the time normally allotted to the State to prepare a case. Consequently, we find that under the facts of this case, the delay in this case was presumptively prejudicial.

(2) Reasons for the delay. It is clear from the facts presented here that the defendant has not shown that the State deliberately delayed his trial in order to gain a prosecutorial advantage.[7] The State argues that the delay was justified because the address on the arrest warrant was incorrect. Defendant argues that the evidence clearly shows that he lived at the same place where he lived when the first indictment was returned, and that he worked at the same place where he was arrested on the first indictment, and that the record is devoid of any evidence that he deliberately attempted to avoid service of the warrant. We interpret the evidence the same way. The delay, of course, was caused by the failure of the State to serve the arrest warrant on the defendant. The State argues that the delay was justified in this case because the sheriff's department diligently tried to serve the warrant on the

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[7]Defendant does argue that the length of delay from the time of the return of the first indictment should be counted, but defendant has not shown the reasons why the State nol prossed the first indictment. We cannot assume that the indictment was nol prossed to give the State a prosecutorial advantage, but we cannot assume otherwise, either. The record just does not show why the indictment was dismissed on motion of the State and why the State decided to seek indictment again approximately one year later.

defendant. We cannot excuse so easily the failure of the State to serve the warrant. The facts show that the defendant was finally arrested by the sheriff's department at his place of employment. He had been employed there for 18 years and had been arrested there by someone in the sheriff's department three years before on the same charges. Also, although it is not clear how the improper address was placed on the warrant, it is clear that this was not the fault of the defendant. The failure of the sheriff to serve the warrant was caused by the State's failure to ascertain the whereabouts of the defendant, who admittedly was not trying to evade service of process. The evidence shows that officers of the State responsible for discovering the place where defendant could be found did not attempt to find the defendant's former or present address or to make any attempt to locate him at his place of employment where he had been located before. We think this constitutes negligence by the State, and although negligence is not weighed as heavily against the State as deliberate delay, it nevertheless must be weighed against the State. Taylor v. State, 429 So.2d 1172 (Ala.Crim.App. 1983), cert. denied, 464 U.S. 950 (1983); consequently, we find that the State's neglect to arrest the defendant in this case in a timely manner is weighty enough to raise a presumption of prejudice to the defendant in this case.

(3) The defendant's assertion of his right. The defendant timely asserted his rights in this case by filing his motion to

dismiss demanding a speedy trial approximately five weeks after his arrest. He testified that, prior to his arrest, he did not know that the charges were outstanding, and there is absolutely no evidence that he knew that he had been reindicted on the same charges that had been previously dismissed.

(4) Prejudice to the defendant. The defendant contends that he was prejudiced by the delay because, he says, his memory has faded. Although ordinarily a mere assertion of a loss of memory is not enough of a showing of prejudice to support a finding that a defendant has been denied due process, where the delay is excessive and is the result of unexcused inaction by the State, the delay is prima facie prejudicial. Murray v. Wainwright, 450 F.2d 465 (5th Cir. 1971); United States ex rel. Solomon v. Mancusi, 412 F.2d 88 (2d Cir.), cert. denied, 396 U.S. 936 (1969). We find that the delay in this case was of such length that defendant's right to a speedy trial has been violated. While the record does not show why the initial charges were dismissed, it would appear that defendant, at the time of the dismissal, had a right to assume that he would not be charged again, and unexcused inaction in a case involving alleged sexual misconduct involving children could be especially prejudicial to a defendant, because the prosecution must depend on the testimony of the alleged victims in many cases. Defendant entered a plea of guilty with a reservation of his right to insist on his "speedy trial" claim; the validity of that claim does not depend

upon whether he is guilty or not guilty of the charges levied against him. The right to a speedy trial is a right guaranteed to every citizen by the state and federal constitutions and it acts as a limitation on State or Government action without regard to the guilt or innocence of the defendant, and in that regard is not unlike the right of a defendant to have illegal drugs excluded from evidence because they were obtained unconstitutionally by State or Government action.

Based upon the above, we find, under all the facts and circumstances of this case, that the defendant was denied his right to a speedy trial. In making this determination, of course, we do not decide whether the defendant is guilty of the charges levied against him. The judgments are, therefore, reversed and rendered.

REVERSED AND RENDERED.

Hornsby, C.J., and Jones, Adams, Houston, and Kennedy, JJ., concur.

Shores, J., dissents.